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No. 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

C. A. LINDGREN, ADMINISTRATOR OF THE ESTATE OF C. E. BARFORD, DECEASED,
PETITIONER,

v.

UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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C. A. Lindgren, p. p.

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of C. A. Lindgren, Administrator of the estate of C. E. Barford, deceased, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(1) The matter involved is the right of the personal representative of a deceased seaman to recover indemnity under the old maritime rules on the ground that the injuries—resulting in death—were occasioned by the unseaworthiness of the vessel upon which he was employed at the time of the accident and have the damages assessed under the death by wrongful act statute of the state wherein the accident and death occurred.

(2) Whether or not, under the facts in this case, Section 33 of the Merchant Marine Act of 1920 (U. S. Code 46, Sec. 688), provides an *exclusive* remedy for death by wrongful act as respects seamen.

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Because the Circuit Court of Appeals for the Fourth Circuit has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

(2) Because the Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

(3) Because the Circuit Court of Appeals for the Fourth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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D. ARTHUR KELSEY,
R. ARTHUR JETT,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1928.

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UNITED STATES OF AMERICA AND COLONNA'S SHIPYARD, INCORPORATED,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. THE OPINIONS OF THE COURTS BELOW.

The opinion in the Circuit Court of Appeals for the Fourth Circuit, was rendered on October 16th, 1928, and is to be found in the advance sheets of the Federal Reporter, Vol. 28, Fed. (2d Series), page 725, the question involved being succinctly stated at page 726. This opinion is also to be found on page 45, *et seq.*, of the transcript of record, and the decision of the District Court appears at page 34, *et seq.*

II. JURISDICTION.

(1) The date of the decree to be reviewed is October 19th, 1928, and will be found upon page 55 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves an important question of maritime law heretofore not definitely decided by this Court, which, for the information of the bench and bar of this country, should be determined.

(3) Construction of Section 33 of the Act of June 5th, 1920, known as the Merchant Marine Act of 1920 (U. S. Code 46, Sec. 688).

III. STATEMENT OF THE CASE.

On October 5th, 1926, the petitioner's decedent was engaged as third assistant shipkeeper (record, p. 17), on the steamship "Hybert", a merchant vessel owned by the United States of America, then in the drydock of Colonna's Shipyard, Incorporated, at Norfolk, where she was being repaired.

The petitioner's decedent having been ordered to secure the measurements of a rubber ball which fits in the drain in the bottom of the life boats, climbed into life boat #4, which at the time was swinging on the vessel's davits over the port side aft, and suspended over the drydock. While in the bottom of the boat for this purpose, the after tackle, due to its defective condition, became disengaged, the life boat swung downward alongside the ship, threw to the drydock below the petitioner's decedent, and two other seamen who were also working in the boat. The petitioner's decedent was instantly killed.

A libel was filed in the United States District Court at Norfolk, against the United States of America, under the Suits in Admiralty Act, and against Colonna's Shipyard, Incorporated. At the conclusion of the trial both the petitioner and the United States conceded (R. 37, 44), that there was no liability upon the shipyard and the libel as to it was dismissed. The Court then found (record, p. 34) that life boat #4 was unseaworthy in that

it was defectively installed and that decedent's estate was entitled to recover; that his heirs were a niece and a nephew who were not dependents; that the action was instituted under the Virginia Death Statute providing a recovery limited to $10,000.00 in case of death, dependency not being a necessary condition, and that in view of the decedent's age, capacity, experience and earnings, his administrator was entitled to recover from the United States the sum of $5,000.00 as damages for his death.

No exception was taken to the District Court's conclusions (record, p. 39) that the vessel was unseaworthy or as to the amount of recovery, but an appeal was taken upon the sole ground that Section 33 of the Act of June 5th, 1920, (U. S. Code 46, Sec. 688), known as the Merchant Marine Act, and the Act of March 30th, 1920 (U. S. Code 46, Secs. 761-768), known as the High Seas Death Act, provide an exclusive remedy for death by wrongful act as respects seamen, and that the state statutes do not apply, and, as decedent had no dependents there could be no recovery.

Petitioner, on the other hand, contended that he had the right as personal representative of the decedent to invoke the old maritime rules on the ground that the vessel was unseaworthy, and apply the Virginia Death Statute (Sec. 5786, Virginia Code 1924), which had been always fully recognized in that field, and also took the position that decedent was not in fact a seaman at the time of the accident. As to the latter question, the Court of Appeals held that the decedent was a seaman. Accordingly, the petitioner, for the purpose of obtaining a final determination by this Court of the questions presented herein, concedes that the decedent was a seaman and brings his application to this Court under the Seamen's Act of July 1st, 1918, C. 113, Sec. 1 (U. S. Code 28, Sec. 837), allowing seamen to sue and appeal without prepayment or security for costs, and/or by virtue of the provisions of the Act of July 27th, 1922 (28 U. S. Code,

Sec. 832), under which this cause was prosecuted in the Courts below. See Order entered on January 7th, 1929, by Senior Circuit Judge Waddill, a certified copy of which has been lodged with the Clerk of this Court.

Upon the first question involved, the Circuit Court of Appeals held that the petitioner was not entitled to recover under the Death Statute of Virginia, and that the right of recovery given seamen by the Merchant Marine Act of 1920, in cases of wrongful death is *exclusive* (the High Seas Death Act not being applicable), and that it is necessary to show dependency, to which ruling the petitioner now applies to this Court for a review.

IV. SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in finding and holding that the petitioner did not have the right as a personal representative of the deceased seaman to recover indemnity under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel upon which he was employed at the time of the accident and have his damages assessed under the death statute of the state wherein the accident and death occurred.

(2) The Circuit Court of Appeals erred in finding and holding that the petitioner could only proceed under Section 33 of the Merchant Marine Act of 1920, making applicable the provisions of the Federal Employers' Liability Act.

(3) The Circuit Court of Appeals erred in not finding and holding that while dependency must be shown as a condition of recovery under Section 33 of the Merchant Marine Act of 1920, nevertheless, the petitioner had the right to proceed under the old maritime rules on the ground of unseaworthiness of the vessel, and as there was no Federal Death Statute occupying that field, his right included the remedy of applying the Virginia Death Statute, which does not require a showing of dependency.

V. ARGUMENT.

(1) Summary of Argument.

Point 1. Petitioner respectfully submits that the Circuit Court of Appeals has confused the remedy afforded seamen with the right of the alternative measures of relief, in that it has held that the remedy given by the alternate right of proceeding under Section 33 extinguishes entirely the right given the seamen to recover indemnity under the old rules on the ground that the death of the seaman was occasioned by unseaworthiness.

Point 2. The decision of the Circuit Court of Appeals denies absolutely to the personal representative of the seaman the right to recover on the ground of unseaworthiness, except possibly such instances where the suit may be brought under the High Seas Death Statute.

Point 3. The Circuit Court of Appeals plainly misconstrues the decision of this Court in *Plamals* v. *The Pinar Del Rio*, 277 U. S. 151, as meaning that the election to proceed under the old maritime law is limited to a recovery of wages, maintenance and cure and does not embrace a recovery of indemnity for unseaworthiness, either for injuries or death.

Point 4. The Circuit Court of Appeals in its consideration of Section 33, places a construction thereon which restricts the rights of seamen to recover for the shipowner's breach of contract,—i. e., to provide a seaworthy vessel—when the whole history of this section, and the original act of Congress which it amends, shows that it was passed as an enlargement of their rights and not as a contraction.

Point 5. The personal representative of the seaman has the right to proceed under the old rule and as there is no Federal death statute occupying that field, he can apply the death statute of the state in

which the accident occurred. In the case at bar the Virginia Death Statute furnished a complete remedy for recovery of damages for death under the old maritime rules.

Point 6. *Northern Coal & Dock Co., et als.*, v. *Emma Strand, et als.*, #41 of the October Term, 1928, 73 L. ed. (Adv. Op.) 99, decided December 10th, 1928, is distinguishable from the case at bar, in that a State Compensation Act was sought to be enforced in the cited case where a longshoreman was killed by reason of his fellow-employee's negligence, while engaged in an essential maritime occupation on board a vessel lying in navigable waters, in which situation Section 33, was the only possible basis of relief. In the instant case the shipowner's violation of its contract to provide a seaworthy vessel gave the seaman or his personal representative the *election* to proceed under the old admiralty rules with the right to libel the ship *in rem* as well as the owner *in personam*, in which event he must go much further in his proof than is necessary under Section 33, or he may accept the new remedy provided by Section 33, with its accompanying burdens.

(2) Discussion of Points.

(a) *Point 1.*

An injured seaman, or in case of death, his personal representative has, by virtue of Section 33 of the Act of June 5th, 1920, a clearly defined new right with a clearly defined remedy.

The old maritime law gives to seamen no right to recover indemnity for injuries sustained through the negligence of the master or any member of the crew, but does give a right of recovery, *in rem* as well as *in personam*, in consequence of unseaworthiness of the ship and her appliances (*The Osceola*, 189 U. S. 158), and in case of death, the death statute of the state in which

the accident occurred, provided such a statute existed, has been unquestionably applied, even where a liability *in rem* was imposed, though none existed in the admiralty, itself. (*Western Fuel Company* v. *Garcia,* 257 U. S. 233; *Anglo Patagonian* (C. C. A. 4th), 235 Fed. 92, *certiorari denied,* 242 U. S. 636. The latter right, which is more difficult of proof, involves no question of contributory negligence or the negligence of a fellow servant, but is based entirely upon a failure of the owner to furnish a seaworthy vessel and appliances, in violation of the implied contract imposed under the admiralty law. The alternate rights, therefore, are two separate and distinct rights, and the remedies given are two separate and distinct remedies. Petitioner insists, therefore, that the remedy afforded by the new right cannot extinguish either the old right or the remedy given by the old right.

(b) *Point 2.*

The conclusion reached by the Circuit Court of Appeals was that as Congress has now passed the Merchant Marine Act of 1920, embracing Section 33, that this legislation was exclusive and supersedes all other law upon the subject so far as are concerned the rights of a personal representative of a seaman to recover from his employer for personal injuries resulting in death. A number of decisions are cited to support this conclusion, the most recent and far reaching of which is the decision of this Court in *Second Employer's Liability Cases,* 223 U. S. 1. By reference to page 55 of the opinion in the case cited, it will be seen that the extent to which this Court went was to hold that now "Congress has acted, the laws of the states, in so far as they cover the same field, are superseded". Obviously, only such laws of the states dealing with employees engaged in interstate commerce, were affected. But the case at bar deals with an entirely different, distinct and independent field from

that covered by the statute, namely, the right under the old maritime law to sue and recover in admiralty either *in rem* or *in personam* indemnity for injuries resulting in death, where the same were due to the unseaworthiness of the vessel or her appliances.

As there is no Federal death statute covering such field, except the High Seas Death Statute, which is inapplicable in this case, the personal representative then has the unquestioned right in the absence of legislation by Congress, to apply the death statute prescribed by the state wherein death occurred. It is submitted that this Court clearly recognizes that there are two separate rights with two separate remedies operating in two separate and distinct fields when it uses this language in the case of *Pacific Steamship Company, Petitioner*, v. *Carl G. Peterson*, #49 of the October Term, 1928, 73 L. ed. (Adv. Op.) 91, decided November 26th, 1928:

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury both grounded on tort that we think an election is to be made under the maritime law as modified by the statute."
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> • • • • • • • • • •
>
> "And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness;" • • •.

Any other construction placed upon the new rule based upon the statute and the old rule based upon the

old maritime law, would deny to the personal representative of the seaman the right to recover on the ground of unseaworthiness, unless the action could be maintained under the High Seas Death Statute.

The decision (R. 48), of the Court of Appeals, however, expressly holds that:

> "The Merchant Marine Act of 1920 covered fully the right of the personal representative of a seaman to recover from his employer for personal injury resulting in death."

Accordingly, the effect of this determination is that the High Seas Death Statute (U. S. Code 46, Secs. 761-768), passed on March 30th, 1920, during the same session that Section 33 (U. S. Code 46, Sec. 688), of the Act of June 5th, 1920, was enacted, is stricken down, along with all State Death Statutes, despite the fact that Congress has consistently manifested its purpose to *further* ameliorate the condition of seamen. *Compare* U. S. Code, Title 46; Chap. 21, Secs. 761-768, (wherein the said High Seas Death Statute was re-enacted, as a subsequent, separate and distinct chapter, under the *same* Title as said Section 33), with Section 33 of the Act of June 5th, 1920, which was re-enacted in said Code as Title 46; Chap. 18, Sec. 688.

(c) *Point 3.*

The Circuit Court of Appeals admits (R. 50-51), that this Court, in the case of *Plamals* v. *Pinar Del Rio, supra,* holds that there remains an election to proceed under the old maritime law or under the statute, but in the construction of this court's opinion it limits the election under the old maritime rules to the right of a claim for wages, maintenance and cure, in line with the shipowner's unsuccessful contentions in *Pacific S. S. Co.* v. *Peterson, supra.* This Court, in *The Pinar Del Rio,* said at page 156:

> "The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. Seamen may invoke at their election the relief accorded by the old rules against the ship or that provided by the new against the employer. But they may not have the benefit of both."

It is submitted that this Court says nothing there to indicate that the seamen under the old rules are now limited to a recovery for wages, maintenance and cure only, but, on the contrary, the natural conclusion to be reached from the language used in that there are separate and distinct rights, each operating in its own separate and distinct field. Indeed this Court has specifically held this to be true in the *Pacific S. S. Co. Case, supra.*

(d) *Point 4.*

In *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 388, it was held:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules."

If the seaman's old rights are withdrawn from him, he is faced in a large number of cases with an almost insurmountable barrier to suit, because under the new statute, an *in personam* action can only be commenced in the district in which the defendant employer resides or in which its principal office is located. To deny a lien *in rem* against the vessel, itself, *The Pinar Del Rio, supra*, and nevertheless require the personal representative of a seaman receiving injuries resulting in his

death to travel possibly half around the world, to institute suit in the district in which the employer resides or has his principal place of business, and most likely when all the plaintiff's witnesses are unobtainable, is certainly an exaction far different from the intention of Congress when it gave to seamen new and additional benefits not recognized or given by the old maritime rules.

To make the personal representative bring his suit under the new statute only would in effect award the alternative to the person from whom redress is sought rather than the one seeking redress. At the same time the latter will be compelled to relinquish the right to enforce the lien, which, under the old admiralty rules, is imposed upon the offending vessel whose unseaworthiness causes death by wrongful act.

The incongruity of the holding below is made manifest when it is considered that if Colonna's Shipyard (the respondent with whom the instant decedent had no contractual relations), had been held liable, a recovery against it would have been allowed to stand. Compare *The Anglo-Patagonian, supra, Lewis* v. *Jones* (C. C. A. 4th), 27 F. (2d) 72, certiorari denied October 22nd, 1928, 73 L. ed. (Adv. Op.) 83. On the other hand, the respondent owner, who assumed the duty of providing decedent a seaworthy vessel—after having been found remiss in this duty—is permitted to escape all liability for his breach of contract.

(c) *Point 5.*

It is submitted that the personal representative had an unquestioned right in the case at bar to proceed as he did under the old maritime rules on the ground that the death of his decedent was the result of injuries received by reason of the unseaworthiness of the vessel's appliances. Upon the evidence submitted, the learned Judge of the District Court unhesitatingly held he was

entitled to recover (R. 34-37), and since there was no Federal statute occupying the field in which the suit was brought, the Court applied the Virginia Death Statute (Sec. 5786, Virginia Code 1924), which by its terms entitled the representative of the decedent to maintain an action to recover damages for death by wrongful act. As it has never at any time been contended that it was necessary to show actual dependency or that the decedent's small niece and nephew were not entitled to recover as his heirs, if this statute is applicable, petitioner will not take the time of the Court to discuss this phase of the case.

(f) *Point 6.*

This Court, in *Northern Coal & Dock Company* v. *Strand, supra,* said:

> "We think it necessarily follows from former decisions that by the Merchant Marine Act—a measure of general application—Congress provided a method under which the widow of Strand might secure damages resulting from his death, and that no State Statute can provide any other or different one. See *Patrone* v. *Howlett,* 237 N. Y. 394."

Inasmuch as the decedents in both of the above cases were stevedores, it is obvious that, but for Section 33 of the Merchant Marine Act of 1920, as construed in *International Stevedore Co.* v. *Haverty,* 272 U. S. 50, 52, they could not have been considered in the category of seamen. Manifestly, neither of them, like the present decedent, was in a position to demand maintenance and cure, if he had not been killed, nor could their personal representatives recover for their respective deaths, in the absence of some negligent act of their employers. Indeed, even under Section 33, the defense of assumption of risk was still open to the employers of Strand

and Howlett, while, as against the personal representative of the instant decedent, assumption of risk would not be a bar. *Panama* v. *Johnson, supra.*

In *Patrone* v. *Howlett, supra,* the New York Court of Appeals merely had before it the question:

> "whether the court properly instructed the jury that the rule of comparative negligence was applicable to the action"

in a situation where the personal representative of the deceased stevedore would have been barred from recovering any damages if the New York statute was held to be in force, because of the stevedore's contributory negligence. It was accordingly held that the plaintiff:

> "did not have a remedy under the state act after the Jones Act occupied the field and became a part of the general maritime law" • • •

The precise question presented in the instant case never having been squarely before this Court for decision, the above quoted statement in the *Northern Coal & Dock Company Case,* as suggested in a similar connection in *Pacific Steamship Company* v. *Peterson, supra,* can hardly be considered more than, 73 L. Ed. (Adv. Op.) 91, at 93:

> "at the most a general expression respecting a particular as to which no question was raised—no allowance for maintenance, cure and wages [or *indemnity* under the old rules, as in the instant case] being there involved—which ought not to control the judgment in a subsequent suit when the very point is presented for decision, • • •, or to prevent the determination as an original question of the proper construction of the statute in that particular. See *U. S.* v. *Corbett,* 215 U. S. 233, 239." (Language in brackets added.)

VI. CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of the United States District Court for the Eastern District of Virginia, may be corrected, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the said Circuit Court of Appeals and finally reverse it.

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